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In the
Court of Criminal Appeals

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COURT OF CRIMINAL APPEALS
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No. 01-16-00179-CR
In the Court of Appeals for the First District of Texas at Houston

No. 1445251
In the 351st District Court of Harris County, Texas

CYNTHIA KAYE WOOD
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S BRIEF ON DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT PERMITTED

STATEMENT REGARDING ORAL ARGUMENT

This Court has not permitted oral argument in this case, and none is needed.

IDENTIFICATION OF THE PARTIES

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Thomas Lewis — Counsel at trial

Trial Judge:

Hon. Mark Kent Ellis — Presiding Judge

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STATEMENT OF THE CASE

The appellant was charged with the felony offense of criminal attempt based on the capital murder of an infant (CR – 32). She entered a plea of guilty to the offense, and the trial court sentenced her to life in prison (CR – 47-48, 70) (RR I – 50). The lower court of appeals reversed the conviction, finding that capital murder was essentially "aggravated murder" and therefore the State was required to allege the constituent elements of the underlying murder. *Wood v. State*, 01-16-00179-CR, 2017 WL 3261373, at *6 (Tex. App.—Houston [1st Dist.] Aug. 1, 2017, no pet. h.). The State filed a motion for rehearing, and the court of appeals issued a similar opinion again reversing the conviction. *Wood v. State*, 01-16-00179-CR, 2017 WL 4127835, at *5 (Tex. App.—Houston [1st Dist.] Sept. 19, 2017, pet. granted). This Court granted review.

GROUND FOR REVIEW

The lower court erred in holding that an indictment for criminal attempt is fundamentally defective when it does not allege the constituent elements of the underlying offense attempted.

STATEMENT OF FACTS

The appellant gave premature birth to a baby boy named K.W. on May 10, 2014, and the baby spent the first three months of his life in the hospital (R.R. I –

6-7) (CR – 6-7). Just two days after being released to go home, K.W. was returned to the hospital because he had stopped breathing, and he remained at the hospital for another five days (R.R. I – 8). On September 19, 2014, K.W. was once again returned to the hospital because of a vomiting issue, and he was forced to undergo surgery (R.R. I – 8-9). On September 30, 2014, K.W. was readmitted to the hospital—this time to the intensive care unit—because the appellant claimed that he was not breathing and did not have a pulse (R.R. I – 9-10).

The medical personnel conducted several tests to determine the cause of K.W.'s condition, but the results did not point to one (R.R. I – 10-11). The staff became concerned that the appellant was the cause (R.R. I – 11). They noticed that she did not seem to be very interested in taking care of K.W. (R.R. I – 12). The baby's repeated hospitalizations appeared to be out of proportion to his healthy appearance (R.R. I – 12). The appellant asked that a gastrostomy tube (G-tube) be placed on K.W.'s body, so that he would get food directly to his stomach (R.R. I – 13). But there was no medical reason for a G-tube (R.R. I – 13).

K.W. was moved out of the intensive care unit of the hospital to an intermediate care unit in the same hospital; for the first two days in that new unit—October 8 and 9— K.W. was doing very well (R.R. I – 14). The appellant was not there during this time, but K.W.'s grandmother was with him (R.R. I – 14).

The appellant returned to K.W. on October 10, and he had another lack-of-breathing episode (R.R. I – 14). The two were alone in the room when this episode occurred (R.R. I – 14-15). K.W. was resuscitated and moved back to the intensive care unit before being placed in a different room in the intermediate care unit shortly thereafter (R.R. I – 15-16). The new room had a hidden camera so that the medical professionals could watch the appellant and K.W. (R.R. I – 16).

On October 11, 2014, the appellant placed an oxygen bag over K.W.'s face as if to give him oxygen, but the bag was not hooked up to oxygen at the time (R.R. I – 16). The next day, the appellant suffocated K.W. on two separate occasions; the video recording captured K.W. kicking his legs as he was being suffocated (R.R. I – 17-20). The appellant pulled a blanket up over K.W.'s face, and his oxygen monitors went off shortly thereafter (R.R. I – 20-21). She also put her hand over his face, and the monitors went off again (R.R. I – 22). After the second occasion, the medical professionals were forced to perform CPR on K.W., and he was again transferred to the intensive care unit (R.R. I – 22-23). K.W. could have suffered permanent brain damage as a result of the appellant's actions (R.R. I – 23).

K.W. did very well after being separated from his mother, and when he went to a foster home, he continued to do well (R.R. I – 23). He has had some developmental delays that could have been a result of the appellant's mistreatment

of him (R.R. I – 24-25). The appellant's mother testified that K.W.'s sister died after repeated hospitalizations (R.R. I – 31). The sister was less than two years old (St. Ex. 4). The appellant claimed that the sister's death was the result of epilepsy and brain malformations, but the death certificate showed that the cause of death was "sudden" and "unexplained" (R.R. I – 31-32) (St. Ex. 4).

SUMMARY OF THE ARGUMENT

The court of appeals held that a purported indictment for attempted capital murder is merely an indictment for attempted murder when the State neglects to allege an "aggravating factor" that transforms murder into capital murder. *Wood*, 2017 WL 4127835, at *5. But this Court has repeatedly held that an indictment for criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted. *Whitlow v. State*, 609 S.W.2d 808 (Tex. Crim. App. 1980); *Jones v. State*, 576 S.W.2d 393 (Tex. Crim. App. 1979). Furthermore, "aggravated murder" is not an offense in Texas. Therefore, this Court should correct the opinion of the lower court of appeals and remand for consideration of the two remaining points of error.

ARGUMENT

The appellant's indictment was titled: "ATTEMPTED CAPITAL MURDER." (CR – 32). The specific allegations were that she "unlawfully, intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANTS ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended." (CR – 32) (emphasis in original). The appellant confessed to those exact allegations (CR – 48-49). Finally, her plea admonishments informed her that she was pleading guilty to "attempted capital murder," with the range of punishment of a first-degree felony (CR – 50).

In *Whitlow*, the indictment alleged that the appellant "unlawfully with the specific attempt [sic] to commit the offense of escape, did then and there attempt to escape from the custody of the Falls County Sheriff by the use of a deadly weapon to-wit: a metal club, said attempt amounting to more than mere preparation that tends but fails to effect the commission of the offense intended,…" *Whitlow*, 609 S.W.2d at 809. The appellant claimed on appeal that the indictment was fundamentally defective for failing to include each of the elements of the offense of escape. *Id.* This Court analogized to attempted burglary cases where the elements of burglary do not have to be alleged in the indictment. *Id.* This Court

held that the indictment was correct because it alleged that the appellant attempted to commit the offense of escape with the additional allegation that it was done with a deadly weapon. *Id.*

Similarly, the indictment in *Jones* alleged that the appellant "did then and there, with the specific intent to commit the offense of murder, attempt to cause the death of WAYNE BROWN, an individual, by knowingly and intentionally shooting the said WAYNE BROWN with a firearm." *Jones*, 576 S.W.2d at 394-395. The appellant filed a motion to quash, claiming that the indictment failed to allege all of the elements of murder, and he appealed the denial of that motion. *Id.* This Court began by summarizing the case law that "the constituent elements of the particular theft or intended theft need not be alleged in an indictment or information for burglary with intent to commit theft." *Id.*, 576 S.W.2d at 395. It held that an "attempt offense is analogous to robbery in that the offense attempted need not be proved as a completed offense. Of course, this is the essence of attempt…we hold that the elements of the offense attempted need not be set out in an attempt indictment." *Id.*

In the present case, the indictment alleged that the appellant had the "specific intent to commit the offense of capital murder of K.W." and that she used her hand to impede K.W.'s ability to breathe, "which amounted to more than mere preparation that tended to but failed to effect the commission of the offense

intended." (CR – 32). That was sufficient to allege the offense of attempted capital murder, and the State was not required to allege the constituent elements of a completed capital murder. *See Whitlow*, 609 S.W.2d at 809; *Jones*, 576 S.W.2d at 394-395; *see also Morrison v. State*, 625 S.W.2d 729, 730 (Tex. Crim. App. 1981).

The lower court of appeals did not address either *Whitlow* or *Jones* in either of its opinions but rather relied on *Crawford v. State*, 632 S.W.2d 800 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd). *Wood*, 2017 WL 3261373 at *6; *Wood*, 2017 WL 4127835, at *5. Crawford was purportedly charged with the capital murder of his victim while in the course of raping her. *Crawford*, 632 S.W.2d at 801. But the relevant statute defined capital murder as murder in the course of committing not rape but "aggravated rape." *Id.* Therefore, the *Crawford* court correctly held that the indictment failed to allege a capital murder offense because it did not allege an "aggravated rape." *Id.*

Crawford is not applicable to the present case because Crawford was charged with a completed capital murder whereas the appellant was charged with criminal attempt. The two offenses have different elements. *Compare* TEX. PENAL CODE § 15.01(a) (West 2012) *with* TEX. PENAL CODE § 19.03(a) (West 2012). A completed offense requires an allegation of the elements of the completed offense, but criminal attempt does not require an allegation of the elements of the underlying offense. *See Whitlow*, 609 S.W.2d at 809; *Jones*, 576 S.W.2d at 394-

395; *Hudson v. State*, 638 S.W.2d 45, 46–47 (Tex. App.—Houston [1st Dist.] 1982, pet. ref'd) ("Our courts have held that an indictment for criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted."). The two are separate and distinct crimes. *See Rabb v. State*, 483 S.W.3d 16, 22 (Tex. Crim. App. 2016) ("although it may be uncommon, a jury does not 'necessarily find' guilt of attempt when it convicts on the completed offense…"). Indeed, in order to find a defendant guilty of only an attempted offense, there must be evidence that he failed to commit the completed offense. *Bullock v. State*, 509 S.W.3d 921, 925 (Tex. Crim. App. 2016) ("to find appellant guilty only of attempted theft, a jury would be required to determine that appellant intended to steal the truck, he did an act amounting to more than mere preparation, but he failed to effect the completed theft—i.e., he failed to unlawfully appropriate the truck by failing to acquire it or otherwise exercise control over it.").

For that same reason, the lower court's reliance on *Sierra v. State*, 501 S.W.3d 179 (Tex. App.—Houston [1st Dist.] 2016, no pet.), was misplaced. Sierra was charged with a completed burglary; therefore, all of the elements of that completed burglary had to be alleged in the indictment. *Id.*, 501 S.W.3d at 182. The appellant in this case was charged with the completed offense of criminal attempt, which was itself based upon an incomplete capital murder. Therefore, the State was not required to plead all of the elements of that incomplete capital

murder in the indictment. *See Whitlow*, 609 S.W.2d at 809; *Jones*, 576 S.W.2d at 394-395.

The lower court's original opinion rested heavily on Section 15.01(b) of the Penal Code to show that the elements of capital murder were also the elements of attempted capital murder. *Wood*, 2017 WL 3261373 at *2. And that reasoning was carried forward into the second opinion, albeit without mentioning Section 15.01(b) by name. *Wood*, 2017 WL 4127835, at *5. Section 15.01(b) provides that "[i]f a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt." TEX. PENAL CODE § 15.01(b) (West 2012).

Section 15.01(b) did not apply to this case because capital murder is not an "aggravated offense" under the Texas Penal Code. Many crimes have an aggravated variant. *See, e.g.*, TEX. PENAL CODE § 22.02 (West 2012) ("aggravated assault"); TEX. PENAL CODE § 29.03 (West 2012) ("aggravated robbery"); TEX. PENAL CODE § 22.021 (West 2012) ("aggravated sexual assault"); TEX. PENAL CODE § 20.04 (West 2012) ("aggravated kidnapping"); TEX. PENAL CODE § 37.03 (West 2012) ("perjury and aggravated perjury"); TEX. PENAL CODE § 43.04 (West 2012) ("aggravated promotion of prostitution"). In each and every case, the aggravated offense is explicitly designated so by its statutory title. And while other states may have an offense titled "aggravated murder," Texas does not.

Compare UTAH CODE ANN. § 76-5-202 (West 2016) ("aggravated murder"); N.Y. PENAL LAW § 125.26 (McKinney 2016) ("aggravated murder") *with* TEX. PENAL CODE § 19.03 (West 2012) ("capital murder"). Nevertheless, the lower court of appeals originally held that capital murder was an "aggravated offense" under Section 15.01(b) because it consisted of the lesser-included offense of murder plus an aggravating circumstance. *Wood*, 2017 WL 3261373 at *2.

The lower court's original opinion would have made every offense into an "aggravated offense" if it contained any lesser-included offense. Unmoored from the statutory language, any greater offense would be an aggravated variant of the lesser-included offense in "the presence of one of the aggravating circumstances enumerated in the statute." *Wood*, 2017 WL 3261373 at *2; *Wood*, 2017 WL 4127835, at *2. Therefore, robbery would be both an aggravated theft and an aggravated assault because both theft and assault can be lesser-included offenses of robbery. *Hudson v. State*, 449 S.W.3d 495, 499 (Tex. Crim. App. 2014); *Jones v. State*, 984 S.W.2d 254, 258 (Tex. Crim. App. 1998). Robbery is theft plus the aggravating circumstance of an assault; it is also assault plus the aggravating circumstance of a theft. *Jones*, 984 S.W.2d at 256-258. Under the lower court's logic, an indictment for attempted robbery would have to allege the aggravating elements that accompanied the theft and the assault. *Wood*, 2017 WL 3261373 at *2; *Wood*, 2017 WL 4127835, at *2. But this Court has repeatedly held that there

is no such pleading requirement. *See Whitlow*, 609 S.W.2d at 809; *Jones*, 576 S.W.2d at 394-395.

Moreover, the circumstances of how subsection (b) was added to Section 15.01 demonstrate that it was intended to apply to offenses that are denoted "aggravated" in the Penal Code. Subsection (b) was added to Section 15.01 in 1975 by House Bill 284. *See* Act of May 8, 1975, 64th Leg., R.S., ch. 203, § 4, 1975 Tex. Gen. Laws 476, 478. Other than the minor amendment to Section 15.01 that was required by the addition of the state jail felony to Texas law, subsection (b) was the most recent amendment of that section.

House Bill 284 made several "significant changes in the Texas rape law." House Study Group, Bill Analysis, Tex. H.B. 284, 64th Leg., R.S. (1975). The bill was meant to address the problems of "reporting and prosecution of rape" where the statutes at the time were seen to "discourage reporting and prosecution because of embarrassment to the victim and the difficulty in obtaining a conviction." House Comm. on Crim. Juris., Bill Analysis, Tex. H.B. 284, 64th Leg., R.S. (1975). Thus, the Legislature was trying to make it easier to prosecute people for rape, aggravated rape, attempted rape, and attempted aggravated rape. In this context, it can be seen that subsection (b) was specifically intended to apply to "aggravated rape," which was explicitly designated such by statute. TEX. PENAL CODE § 21.02 (Vernon 1974). It was not intended to make the prosecution of attempted capital

murder more difficult, especially when capital murder was not designated as "aggravated murder" or any other type of aggravated offense.

Even if the Legislature was worried about someone being convicted of attempted aggravated rape when his conduct only showed an attempted rape, that was not an issue in the present case. As the lower court of appeals recognized, the evidence showed far more than an attempted murder—it showed an attempted capital murder. *See Wood*, 2017 WL 4127835, at *3 ("Dr. Girardet testified that the complainant was born on May 10, 2014, and that he was four months old at the time he was brought to Memorial Hermann Children's Hospital. The PSI report referred to the complainant as a 'premature infant'."). Therefore, Section 15.01(b) does not apply to a non-aggravated offense such as capital murder.

After the State's motion for rehearing, the court of appeals no longer cited Section 15.01(b); but such a deletion did not improve the strength of the court's reasoning. *Wood*, 2017 WL 4127835, at *2. Section 15.01(b) provided at least some legal basis for the court of appeals to argue that the elements of the underlying capital murder were also the elements of attempted capital murder. But without that legal basis, the court of appeals was forced to resort to bare assertions such as:

> There is no crime of capital murder that is different from murder. Capital murder is murder. But, it is murder that is accompanied by an aggravating factor that provides the State with a greater range of punishment than that which applies to the offense of

> murder. The requirement that the indictment allege the aggravating factor under section 19.03(a)(2) is particularly important given that the statute lists nine possible aggravating circumstances elevating the offense of murder to capital murder. The indictment in this case did not authorize a conviction for attempted capital murder, and the State is held to the offense charged in the indictment.

Wood, 2017 WL 4127835, at *5. Once again, the lower court of appeals failed to recognize the distinction between a completed offense and an attempted offense. This Court has repeatedly explained that distinction to show that criminal attempt does not require an allegation of the elements of the underlying offense. *See Whitlow*, 609 S.W.2d at 809; *Jones*, 576 S.W.2d at 394-395.

One of the elements of capital murder is a completed murder. TEX. PENAL CODE § 19.03(a) (West 2012) ("A person commits an offense if the person *commits murder* as defined under Section 19.02(b)(1) and…") (emphasis added). But a completed offense is nowhere listed as an element of criminal attempt. TEX. PENAL CODE § 15.01(a) (West 2012) ("A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended."). And this Court has repeatedly acknowledged that criminal attempt and the completed offense are distinct crimes with different requirements for proof. *See Rabb*, 483 S.W.3d at 22; *Bullock*, 509 S.W.3d at 925. Therefore, the lower appellate court erred in requiring a completed offense to be alleged as an element

of the criminal attempt. This Court should correct the errors of the lower court of appeals and remand for consideration of the two remaining points of error.

PRAYER

It is respectfully requested that the opinion of the court of appeals be reversed and corrected, and the case remanded back to that court.

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CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that: (a) the word count function of the computer program used to prepare this document reports that there are 3,948 words in it; and (b) a copy of the foregoing instrument will be served by efile.txcourts.gov to:

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